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MAR 1 6 1992

Federal Communications Commission
Office of the Secretary

March 16, 1992

<u>VIA HAND DELIVERY</u>
Ms. Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: <u>Ex Parte Presentation</u>

Dear Ms. Searcy:

On this date, Marvin Rosenberg and Harold C. Crump, on behalf of Hubbard Broadcasting, Inc. (Hubbard), licensee of television station KSTP-TV, St. Paul, Minnesota, made an oral <u>ex parte</u> presentation to the following Commissioners and Commission personnel:

Commissioner Sherrie P. Marshall
Commissioner Ervin Duggan
Roy J. Stewart, Esquire

The purpose of the presentation was to support a Petition for Rule Making, later filed on January 17, 1992, by Hubbard, which requests that the Commission initiate a rule making proceeding to amend Section 73.658(k) of the Commission's Rules, referred to generally as the Prime Time Access Rule (PTAR), to delete the "off-network" program restriction contained in Section 73.658(k). A copy of the Petition for Rule Making is attached hereto. The Petition for Rule Making was provided during the presentation.

A number of filings are currently pending in various proceedings at the Commission in which parties seek deletion or repeal of the off-network program restriction of the PTAR. These include an Application for Review filed on June 22, 1987, seeking review of the denial without consideration of a Petition for Rule Making filed on April 24, 1987, by Channel 41, Inc., licensee of Station WUHQ-TV, Battle Creek, Michigan; a Petition for Declaratory Ruling, filed on April 18, 1990, by First Media Corporation, licensee of Station WCPX-TV, Orlando, Florida, in which it is contended that the PTAR is unconstitutional; Comments filed by The Walt Disney Company in both MM Docket No. 90-162 and in response to a Petition for Declaratory Ruling or,

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in the Alternative, for a Waiver of the PTAR with respect to the program "MARRIED...WITH CHILDREN," filed by Columbia Pictures Television, Inc. and ELP Communications on October 24, 1990; and Comments seeking repeal of the off-network ban filed in MM Docket No. 91-221. Prior to filing its Petition on january 17, 1992, Hubbard had not previously addressed this issue in filings of the above proceedings.

The Commission has already indicated that it will not address the issue of the PTAR in MM Docket No. 90-162. To the best of Hubbard's knowledge, the only pending proceeding in which the issue may be considered is the Video Marketplace Inquiry, MM Docket No. 91-221, an exempt proceeding, under Section 1.1204 (a)(4) of the Rules. Accordingly, an original and only one copy of this letter and the attached Petition are being filed. If additional copies of this filing are required or desired, Hubbard will supply them immediately upon request.

Because the purpose of the oral presentation was to summarize and support the Petition for Rule Making, Hubbard herewith submits the entire Petition for Rule Making in the place of the written memorandum summarizing its comments and arguments, as required by Section 1.1206(a)(2) of the Commission's Rules.

Should any question arise concerning this matter, or should any additional information be necessary or desired, please communicate with this office.

Very truly yours,

Marvin Rosenberg

Marvin Rosenberg
Counsel for
Hubbard Broadcasting, Inc.

MR:ik
Enclosure

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.658(k) of the Commission's Rules To Delete the "Off-Network" Program Restriction	))))	RM No. _____ MM Docket No. _____

To: The Commission

PETITION FOR RULE MAKING

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January 17, 1992

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.658(k) of the Commission's Rules To Delete the "Off-Network" Program Restriction	))))	RM No. _____ MM Docket No. _____

To: The Commission

PETITION FOR RULE MAKING

SUMMARY

Herein Hubbard Broadcasting, Inc. (Hubbard), licensee of television station KSTP-TV, St. Paul, Minnesota, respectfully petitions the Commission to initiate a rule making proceeding to amend Section 73.658(k) of the Commission's Rules, referred to generally as the Prime Time Access Rule (PTAR), to delete the "off-network" program restriction contained in Section 73.658(k).

As Hubbard demonstrates, the practical effect of the off-network program ban is that 164 of the nation's 1489 operating television stations cannot broadcast certain programming for one hour each day, not because the programming is indecent, obscene, or otherwise contrary to the public interest but solely because it formerly appeared on a national network. This is not the first time the Commission has been asked to repeal or remove the off-network program ban in the PTAR, nor is it the only such request presently before the Commission. There are presently pending in various proceedings requests by television networks, licensees, and program producers seeking repeal of the

off-network program restriction. Rather than consider the issue in a proceeding involving other issues, the Commission should initiate a rule making proceeding for the purpose of addressing this issue alone. The time is now ripe for consideration of the elimination of this unnecessary anticompetitive and unconstitutional regulation that limits the ability of certain local broadcasters to compete in their markets by dictating to them that they "can't carry" some of the most popular television programs ever created during one of the most popular viewing periods in the day, while permitting their competitors to offer those very same programs without any limitations.

As is demonstrated below, the off-network program restriction, designed to lessen the competitive dominance of the networks, instead restricts and impedes the local stations affiliated with the networks from competing in their local markets for programming, viewers, and revenues. As the local network affiliates face ever increasing competition and declining revenues, it is the local viewer who will suffer from the inability of the local network affiliates to compete with the independents for the most popular programming, since it is the local network affiliates who provide the bulk of locally produced news and public affairs programs, as the FCC's staff has found.

The off-network program ban has never accomplished and is no longer necessary to achieve the primary objectives for which it was adopted. One of those objectives, to lessen network dominance, has been accomplished by technological changes and resulting marketplace forces.

The second primary objective for which the PTAR was adopted, to free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments, is actually impeded and frustrated by the off-network ban. Network affiliates cannot freely choose the programming they want to broadcast. They are prohibited from showing in the fourth hour of prime time the most popular programs that have ever appeared on television. Thus, as is demonstrated herein, the off-network program restriction is also unconstitutional and should be repealed.

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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of the Commission's Rules To	)	MM Docket No. _____
Delete the "Off-Network"	)	
Program Restriction	)	

To: The Commission

PETITION FOR RULE MAKING

Hubbard Broadcasting, Inc. (Hubbard), licensee of television station KSTP-TV, St. Paul, Minnesota,1/ by its attorneys, hereby respectfully petitions the Commission to initiate a rule making proceeding to amend Section 73.658(k) of the Commission's Rules, referred to generally as the Prime Time Access Rule (PTAR), to delete the "off-network" program restriction contained in Section 73.658(k). Specifically, petitioner requests that the Commission amend Section 73.658(k) of its Rules to read, in part, as follows:

> "Commercial television stations owned by or affiliated with a national television station network in the 50 largest television markets shall devote, during the four hours of prime time (7-11 p.m. e.t. and p.t., 6-10 p.m. c.t. and m.t.), no more than three hours to the presentation of programs originated and distributed by a national network, other than feature films, or, on Saturdays, feature films . . . ."

In support whereof, the following is submitted:

1/ Companies affiliated in ownership with Hubbard Broadcasting, Inc. (Hubbard), are the licensees of the following television stations: KOB-TV, Albuquerque, New Mexico; KOBF(TV), Farmington, New Mexico; WTOG(TV), St. Petersburg, Florida; WDIO-TV, Duluth, Minnesota; WIRT(TV), Hibbing, Minnesota; KSAX(TV), Alexandria, Minnesota; KRWF(TV), Redwood Falls, Minnesota; and KOBR(TV), Roswell, New Mexico.

I. Introduction

The practical effect of the off-network ban is that 164 of the nation's 1489 operating television stations cannot broadcast certain programming for one hour each day, not because the programming is indecent, obscene, or otherwise contrary to the public interest but solely because it formerly appeared on a national network. Herein, Hubbard requests that the Commission initiate a rule making proceeding proposing to eliminate this antediluvian restriction. This is not the first time the Commission has been asked to repeal or remove the off-network ban in the PTAR, nor is it the only such request presently before the Commission. Indeed, for the last four and one-half years, an Application for Review of the hasty rejection, without consideration, of a similar Petition for Rule Making has been languishing at the Commission. Over the last eleven years other attempts to persuade the Commission to consider the elimination of this aspect of the PTAR have similarly been ignored. The time is now ripe for consideration of the elimination of this unnecessary anticompetitive and unconstitutional regulation that limits the ability of certain local broadcasters to compete in their markets by dictating to them that they "can't carry" some of the most popular television programs ever created during one of the most popular viewing periods in the day, while permitting their competitors to offer those very same programs without any limitations.

II. Background

Section 73.658(k) provides that commercial television stations affiliated with a national television network in the 50 largest television markets may devote no more than three hours during the four hours of prime time to the presentation of programs that originate from a national television network or programs that formerly were presented by a national network (known as "off-network" programs). The "off-network" restriction, which is the only aspect of the PTAR that Hubbard seeks to repeal, essentially prohibits a local television station that is affiliated with a national television network (and carrying network programming for three hours of prime time) from broadcasting in the fourth hour of prime time any program material, even if acquired from non-network sources, that was ever carried on a national network. Thus, for example, if Hubbard's KSTP-TV, an affiliate of the ABC Television Network, carries three hours of programming originated from and distributed by the ABC Television Network during the four hour prime time period, the off-network ban prohibits Hubbard from showing on its station KSTP-TV in its local Minneapolis-St. Paul market, during the remainder of the prime time period, any programs that ever appeared on any network.

The off-network restriction does not apply to all television stations or to all commercial television stations or even to all network affiliates, only to the 164 affiliates of ABC, CBS, and NBC in the top 50 markets. It does not prohibit only network-produced programs but precludes any program that has ever been carried on any network. The off-network restriction does not apply to the 50 network affiliates of Fox Broadcasting Company (Fox) in the top 50 markets.

As is demonstrated below, the off-network restriction, designed to curb the competitive dominance of the networks, instead restricts and impedes the local stations affiliated with the networks from competing in their local markets. As the local network affiliates face ever increasing competition and declining revenues, it is the local viewer who will suffer from the inability of the local network affiliates to compete with the independents for the most popular programming, since it is the local network affiliates who provide the bulk of locally produced news and public affairs programs, as the FCC's staff has found.

The PTAR was first adopted in 1970 by Report and Order in Network Television Broadcasting, 23 F.C.C.2d 382 (1970) (Prime Time I), after a lengthy rule making proceeding that followed an earlier program inquiry. However, as then Chairman Dean Burch pointed out in a Dissenting Statement, the off-network proscription was not proposed by the Commission in the rule making proceeding in which it was adopted and thus there was "no record developed on this important aspect." 23 F.C.C.2d at 415 (Burch dissenting). Moreover, he continued,

> "the Commission today has no data whatsoever as to the economic impact of this particular provision, both on the efficacy of the rule and upon the contractual arrangements of the stations."

Id. Nevertheless, the off-network restriction was adopted, and it went into effect October 1, 1972. See Second Report and Order in Prime Time Access Rule, 50 F.C.C.2d 829, 830 (1975) (Prime Time II).

Because of complaints about the PTAR's effects and the filing of three petitions seeking its repeal, the Commission instituted another inquiry and rule making proceeding in 1972. 50 F.C.C.2d at 831. That proceeding eventually led to the reaffirmation in Prime Time II of the rule as originally adopted in 1970, modified by the codification of certain waiver practices that developed out of rulings on waiver requests filed after the rule's adoption in 1970. Id. at 835.

At the outset of its Discussion and Conclusions in Prime Time II, the Commission reflected on the PTAR's primary objectives:

> "In evaluating the arguments of the majors and other opponents of the rule, it is important to bear in mind the rule's primary objectives: to lessen network dominance and free a portion of valuable prime time in which licensees of individual stations present programs in light of their own judgments as to what would be most responsive to the needs, interests and tastes of their communities. At the same time, the rule seeks to encourage alternative sources of programs not passing through the three-network funnel so that licensees would have more than a nominal choice of material. These are still valid objectives. It was also noted that this increased supply would be a concomitant benefit to independent stations; and 'it may also be hoped that diversity of program ideas may be encouraged by removing the network funnel for this half-hour...'. Thus, diversity of programming was a hope, rather than one of the primary objectives. It was emphasized that the Commission's intention is not to smooth the path for existing syndicators or encourage the production of any particular type of

> program; the `types and cost levels of programs which will develop must be the result of competition which will develop.'"

50 F.C.C.2d at 835 (emphasis added).

By 1980, the Commission's Network Inquiry Special Staff (Special Staff), assembled to conduct an inquiry into "the matter of alleged dominance of the nation's commercial television industry by the three major commercial networks,"2/ had concluded that the "off-network" ban of the PTAR had not "increased the extent of competition in either syndicated program supply or distribution markets" because "[t]hose markets were competitively structured prior to imposition of the rule." See Network Inquiry Special Staff, I New Television Networks: Entry, Jurisdiction, Ownership and Regulation 510 (1980) (hereinafter Final Report). The Special Staff also found that:

> "The rule has not increased the diversity of offerings to the viewing public except insofar as it necessitates the substitution of cheaper programs for more expensive ones and thereby leads to the exhibition of different program types. More fundamentally, the rule does nothing to increase the number of outlets or viewing options available to the public and thus could not be expected to affect competition or diversity in a manner that would increase viewer satisfaction."

In considering whether the rule served Commission policies, the Special Staff also concluded:

> "The question remains whether by compelling affiliates to do their own programming during the access period, the rule fostered the Commission's goal of localism. The general answer appears to be that it did not."

2/ See Commercial Television Network Practices, 62 F.C.C.2d 548 (1977).

Id. at 511-12. Despite these findings, the Commission has never re-examined the off-network ban and has ignored or summarily rejected requests for it to do so.3/

It is clearly time for re-examination and elimination of the off-network restriction of the PTAR. Over the past several years, numerous parties have demonstrated to the Commission that the off-network ban is no longer warranted in light of the dramatic changes in technology and in the video marketplace that have occurred since the Commission's adoption of the PTAR and in light of recent judicial decisions addressing the constitutionality of Commission regulations. A number of filings are currently pending in various proceedings with no evidence that they will be addressed or considered. These filings include a Petition for Rule Making similar to the instant Petition.

On April 24, 1987, Channel 41 Inc. (Channel 41), licensee of Station WUHQ-TV, Battle Creek, Michigan, petitioned the Commission to initiate a rule making proceeding to delete the off-network program ban of the PTAR. In its Petition for Rule Making (Channel 41 Petition), Channel 41 demonstrated that: (1) the off-network ban was adopted without an adequate factual record; (2) sweeping technological and marketplace changes since

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3/ For example, in 1981, Chronicle Broadcasting Company petitioned the Commission to delete the "off-network" restriction; but the Commission dismissed the Petition for Rulemaking, RM-3951 (filed July 17, 1981), explaining that it was awaiting recommendations on the Special Staff's report from its Broadcast Bureau (now the Mass Media Bureau). However, no proceeding was ever forthcoming.

1970 have removed any possible factual support for it, and its rationale of expanding the market for first-run syndicators and thereby reducing network influence has been accomplished by the tremendous growth in recent years of other first-run program buyers, including cable operators and independent stations; (3) the off-network ban restricts local affiliates' ability to compete in the market by limiting the program choices they can make, while not placing such restrictions on competitors; and (4) continued enforcement of the ban is unconstitutional and violates the First Amendment.

On May 22, 1987, the Chief of the Mass Media Bureau dismissed the Channel 41 Petition without even placing it on public notice and asking for public comments. Letter from James C. McKinney, Chief, Mass Media Bureau, to counsel for Channel 41, Inc., May 22, 1987. The Letter stated that deletion of the off-network ban would deprive the PTAR of "most of its effect."

On June 22, 1987, Channel 41 filed an Application for Review of the denial of the Channel 41 Petition. Although it was filed in June, 1987, over four and a half years ago, no action has been taken on Channel 41's Application for Review; and it remains pending.

Also pending is a Petition for Declaratory Ruling (First Media Petition), filed on April 18, 1990, by First Media Corporation (First Media), licensee of Station WCPX-TV, Orlando, Florida, in which First Media demonstrated that the PTAR is unconstitutional because it favors one speaker over another and restricts the program choices of certain broadcasters.4/ The First Media Petition remains pending. Although the Commission listed it on a News Release regarding filings of "more than routine interest" (Mimeo No. 3252, May 18, 1990) and other parties filed comments in response to the First Media Petition, the Commission has never formally invited comments on the First Media Petition. Further, while in its Further Notice of Proposed Rulemaking in MM Docket No. 90-162, 5 FCC Rcd 6463, 6469 n. 24 (1990), in which the FCC considered modifying its financial interest and syndication rules (Fin/Syn), the Commission noted that it would consider First Media's Petition in a separate proceeding, it has apparently not yet commenced such a proceeding.

On October 24, 1990, Columbia Pictures Television, Inc. and ELP Communications (Columbia) filed a Petition for Declaratory Ruling or, in the Alternative, for a Waiver (Columbia Petition) of the PTAR with respect to its program, "MARRIED...WITH CHILDREN" (MARRIED). Columbia sought a Commission ruling that future episodes of "MARRIED" would not be considered off-network programs under the PTAR regardless of whether those future

4/ First Media noted that the PTAR had withstood constitutional challenge before as a government regulation of program content, based on the concept of spectrum scarcity, but that that rationale was no longer justified because of technological changes since the 1970s, including the growth of cable systems with numerous video channels. First Media also noted that the concept of spectrum scarcity had been rejected by the Commission in rescinding the Fairness Doctrine. Accordingly, it asked the FCC to declare the PTAR unenforceable as violative of the First Amendment.

episodes had their first run on Fox Broadcasting Company (Fox), to whom it had been supplying the program, or on NBC, ABC, or CBS. Such a ruling would permit Columbia to sell future episodes of "MARRIED" to network affiliates during the access period. By Public Notice, released October 30, 1990, the FCC requested public comments on the Columbia Petition (File No. MMB 901024). The Columbia Petition remains pending.

On November 21, 1990, another program producer, The Walt Disney Company (Disney), filed two sets of identical Comments in the proceeding concerning the Columbia Petition and in MM Docket No. 90-162, the Fin/Syn proceeding, to ask the FCC to delete the off-network ban of the PTAR.

In its Further Notice of Proposed Rulemaking in MM Docket No. 90-162, 5 FCC Rcd 6463, 6469 (1990), the FCC noted that it would not revisit or revise the PTAR in the Fin/Syn proceeding. See also Memorandum Opinion and Order in MM Docket No. 90-162, FCC 91-336, released November 22, 1991, par. 85. Disney's request nevertheless remains pending, insofar as it was also filed in response to the Columbia Petition.

The issue of PTAR arose again most recently in comments filed in the Commission's video marketplace proceeding. In response to the FCC's Notice of Inquiry in MM Docket No. 91-221, 6 FCC Rcd 4961 (1991) (Video Marketplace Inquiry), CBS Inc. (CBS) and others filed Comments that, inter alia, asked the

Commission to repeal the off-network ban.5/ CBS demonstrated that the off-network restriction curtails the ability of affected affiliates to compete for viewers during the access period by limiting their choice of programming. Further, CBS noted that the ban depresses the after-market value of network series, because affiliates in top markets would pay more for such programs if they could be run in the access period, with the result that such series are more expensive for networks to license from producers. Additionally, CBS showed that the rule favors cable networks and new television networks, such as Fox, and burdens established broadcast television networks, at a time when the future of the three established commercial television networks as distributors of programming is in doubt.

5/ In its Reply Comments of National Broadcasting Company, Inc., NBC supported the CBS Comments as well as Disney's pending request regarding PTAR. NBC also asked the FCC to reverse its recent interpretation of PTAR treating productions of network-owned stations as network programs for purposes of applying the rule.

NBC argued that the off-network ban does not further diversity of program sources in prime time. According to NBC, two program suppliers--King World and Paramount--supply most of the programs acquired from outside sources by Top 50 market affiliates during the access period; and the major program suppliers and studios dominate both the off-network and syndicated first-run programming marketplaces. Further, NBC demonstrated, the PTAR restricts the independent licensee decision-making the FCC sought to advance in adopting the PTAR. According to NBC, the PTAR restricts individual station program choices and lessens competition in the first-run marketplace, without any countervailing public benefits. As NBC noted, in today's highly competitive marketplace, the government should not prohibit major market affiliates from choosing those programs that, in their judgment, most appeal to their audiences, regardless of program source.

Finally, CBS demonstrated that the marketplace had been drastically altered since 1970, when the PTAR was adopted. According to CBS, the proliferation of independent stations has resulted in an increase in the time available to all syndicated programming. Further, the deletion of the off-network ban would not diminish the vitality of first-run syndicated programming, as both affiliated and independent stations now broadcast much first-run syndicated programming in situations in which they may broadcast off-network fare.

Bonneville International Corporation (Bonneville) also filed Comments in the video marketplace proceeding asking the FCC to initiate a proceeding to reexamine the PTAR. Bonneville, too, demonstrated that the PTAR, particularly its off-network restriction, cannot be justified in today's video marketplace. Bonneville stated that its television stations have had business and programming judgments compromised by PTAR.

The Commission cannot continue to ignore these requests for re-examination of the "off-network" ban in light of its own analysis of today's rapidly changing video marketplace. Rather than addressing this issue in one of the currently pending proceedings affecting television, the Commission should initiate a rule making proceeding directly and solely to address this issue. Such an inquiry is warranted and long overdue.

III. The Off-Network Restriction Is No Longer Necessary To Achieve the Objectives for Which It Was Adopted

The primary objectives behind the PTAR, as expressed in

Prime Time II, may have been valid and necessary objectives in 1975. However, it is clear that in 1992, as the Commission's own studies have concluded, network dominance has been lessened and there is an increased supply of first run, non-network syndicated programming. Clearly the off-network ban is no longer necessary to "lessen network dominance." Technological advances and economic realities have accomplished that objective. The Commission itself has observed that "the availability of outlets and programming has markedly reduced the audience shares of the broadcast networks and their affiliates." See Video Marketplace Inquiry, 6 FCC Rcd at 4961.

In originally adopting PTAR and the off-network restriction in Prime Time I, 23 F.C.C.2d at 385, the Commission indicated that it was compelled to act by certain facts, including: (1) there were only three national networks; (2) in the top 50 markets there were only 224 stations of which 153 were network affiliates; (3) in the U.S. there was a total of 621 stations of which 499 were network affiliates; and (4) of the top 50 markets, only 14 had at least one independent VHF television station. Id. at 385. As a result of these and other factors, the Commission concluded that the market was seriously unbalanced to the disadvantage of independent producers. The Commission indicated that it believed its action would provide "a healthy impetus to the development of independent program sources" and that it hoped that diversity of program ideas would be encouraged by its action. Id. at 395.

Today there are four national networks, including Fox Broadcasting Company (Fox). Although it may not yet meet the definition of a network for PTAR and thus its affiliates are free from the restrictions faced by affiliates of ABC, NBC and CBS, the Fox network, with 134 affiliated television stations, is generally considered to be a national network. Indeed, there is a Fox network affiliate in each of the top 50 markets. See The Broadcasting Yearbook 1991 C-43, C-129-C-203 (hereinafter 1991 Yearbook). In the top 50 markets today there are 616 television stations, of which 164 are affiliates of the three major television networks. Id. In the U.S. today there are a total of 1489 television stations, see "Broadcasting's By the Numbers, Summary of Broadcasting & Cable," Broadcasting (Jan. 13, 1992), of which 649 are affiliates of the three major networks, see 1991 Yearbook at F-32-33, F-35, F-38-39. Of the top 50 markets today, 34 have at least one independent VHF television station. Id. at C-129-C-203. There is no question that today's video marketplace in no way resembles the competitive environment that existed in 1970 or even 1975.

A typical example of the dramatic increase in competition faced by network affiliates in the top 50 markets is the Houston market. As the 1970 Broadcasting Yearbook reflects at page 51, in 1970, Houston was ranked as the 14th largest ADI. There were five stations in the market: three network affiliates and two independents. Id. at page 33. In contrast, the 1991 Yearbook, at C-160, reports that Houston is now the 10th largest ADI and now has 16 television stations: three network affiliates; and thirteen non-network affiliates (one Fox affiliate,6/ three educational television stations, and nine other independent television stations). The effect of the off-network ban is that during one block of time, three television stations out of the 16 in the market "can't carry" the most popular programs that have ever appeared on television. The other thirteen stations and the cable systems and services in the market face no similar restrictions. By FCC regulation, three television stations are not free to compete with their competitors and are not free to program their stations as they see fit.

In the New York City market (ADI #1), there are 21 television stations, only three of which are network affiliates. In Los Angeles (ADI #2), there are 26 television stations, only three of which are affiliated with ABC, CBS or NBC. See 1991 Yearbook at C-176, C-168. There are now at least seven television stations in each of the top 50 markets: in 22 markets there are 7-10 stations; in 16 markets there are 11-15 stations; in 8 markets there are 16-20 stations; and in 4 markets there are 21-26 stations. Id at C-129-C-203. Even without any consideration of cable, it is clear that network affiliates face vigorous competition for audiences, revenues, and programming in each of the top 50 markets. There is no demonstrated or perceived rationale for retaining the off-

6/ For purposes of the PTAR, Fox affiliates are not considered "network" affiliates, although Fox is commonly referred to as the fourth network.

network restriction given the realities of today's changing video marketplace.

In the OPP Working Paper (26), Broadcast Television in a Multichannel Marketplace, 6 FCC Rcd 3996 (1991) (OPP Paper), the FCC's Office of Plans and Policy examined changes in competition in the television broadcast industry over the period from 1975 to 1990 and presented its predictions for the next decade. At the very outset of the Executive Summary to the OPP Paper, the FCC's staff observed:

> "Over the past fifteen years the range of broadcast, cable, and other video options available to the American viewer has increased dramatically."

6 FCC Rcd at 3999. The staff noted that its

> "analysis supports the conclusion that in the new reality of increased competition regulations imposed in a far less competitive environment to curb perceived market power or concentration of control over programming are no longer justified and may impede the provision of broadcast services."

Id. The OPP Paper's Executive Summary also contains the following findings:

- In 1975, the U.S. had three commercial broadcast television networks and no cable networks; cable television was solely a broadcast retransmission medium.
- By 1990, there were four commercial broadcast networks and over 100 national and regional cable networks.
- In 1976 only 17% of television households subscribed to cable.
- In 1990 over 56% of television households subscribed to cable.
- The number of broadcast stations increased by 50% during the period 1975-90, with

independent television stations accounting for three-quarters of the growth.

- The number of off-air stations available to the median household increased from six in 1975 to ten in 1990.

- By 1990 94% of television households were located in markets with five or more televisions stations.

- In 1975 there were no home satellite dish systems and no home videocassette recorders (VCRs).

- In 1990 3% of television households had home dishes and 69% owned VCRs.

Id. These findings were largely adopted by the Commission as "statistics" that "are well known" in its Video Marketplace Inquiry, 6 FCC Rcd 4961.

The OPP staff also summarized its findings on viewing patterns:

> "Expansion in the availability of outlets and programming has dramatically changed viewing patterns. The broadcast networks and their affiliates have been the big losers. The prime-time viewing share of the three major commercial networks plummeted from 93 in 1975 to 64 in 1990. The all-day three-network viewing share fell from 41 to 35 between 1984/85 and 1989/90. These declines have been accompanied by increased viewing of independent stations and cable networks. In recent years, pay cable and independent station viewing has leveled off, but basic cable viewing continues to grow. Overall, viewing of cable-originated programming rose from 14 percent to 26 percent of total viewing and from 24 percent to 39 percent of viewing in cable households. Thus, the decline in the broadcast share results from both increased cable penetration and increased cable viewing shares in cable households."

OPP Paper, 6 FCC Rcd at 4000 (emphasis added). Thus, the Commission's own studies and findings reflect that the lessening of network dominance is no longer a necessary objective.

Technological advances and economic advances have also accomplished what the PTAR's off-network restriction did not accomplish--an increase in first run syndicated programming. As the FCC's OPP Paper notes, the expansion of the number of independent television stations over the last decade has considerably increased the demand for syndicated programming, and satellites have reduced the costs of distribution. Id. at 4087. As a result, the syndication market in recent years has produced large numbers of new first run programs, and the "syndication market has been highly profitable." Id. Moreover, the "growth in the number of cable networks has resulted in a major increase in the quantity of programming produced." Id. at 4088. The "past fifteen years have seen the advent of alternative sources of video programming, primarily through the increasing penetration of cable television and the introduction and diffusion of the home videocassette recorder." Id. at 4009. During this same period, viewing of broadcast network programming has declined more sharply than viewing of other over-the-air programming. Id. at 4018. In short, there is absolutely no reason for the Commission to believe that there is any continuing need or justification for the "off-network" program restriction.

In evaluating the results of its research and analysis and the implications for regulations, the FCC's OPP staff concluded:

> "Existing broadcast regulations may prevent broadcasters from ... offering services the public would value. Relaxing or eliminating such rules would allow broadcasters to compete more effectively, and